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In The Supreme Court of the United States

ARIZONA SCHOOL CHOICE TRUST, *et al.*,

Petitioners,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Goldwater Institute petitions the Court for leave to file the attached brief as *amicus curiae*. The Goldwater Institute, a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code, advances public policies that further principles of limited government, economic freedom and individual responsibility. Dr. Matthew Ladner, the primary author of the brief, is Vice President of Research at the Goldwater Institute and an expert in the field of school choice. The Goldwater Institute's interest in filing this brief is to provide useful and relevant factual information regarding the educational options and fiscal policy that drive school choice in Arizona. To the best of the Goldwater Institute's knowledge, this information has not been brought to the Court's attention in the parties' pleadings.

On March 18, 2010, the Goldwater Institute determined that it could devote the necessary resources to author and file its brief. The very same day, the Institute immediately notified and sought consent from all parties via e-mail and USPS First Class mail. Because Petitioners' reply briefs are due on March 24, 2010, the Goldwater Institute's *amicus brief* is also due on March 24, 2010. SUP CT. R. 37.2(a). Although no party objects to the filing of this brief, and the Institute diligently notified all parties, it was nevertheless unable to comply with Supreme Court Rule 37.2(b) because it was only able to give

seven days notice to the parties of its intent to file its brief.

Given the succinct factual nature of the Institute's brief, the consent of the parties, and the absence of prejudice to any party,[1] the Institute respectfully requests that the Court grant leave to file its brief as *amicus curiae*.

Respectfully submitted,

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March 24, 2010

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[1] Mr. Bender, counsel for Respondents, made counsel for *amicus curiae* aware that he was granted a 30-day filing extension by this Court and, as a result, is not prejudiced by the Institute's seven day notice.

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BRIEF FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute was founded in 1988 to advance non-partisan public policies of limited government, economic freedom, and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the provisions of the Arizona and federal Constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief. As explained above in the included Motion for Leave to File Brief as *Amicus Curiae*, notice could not be provided to the parties ten days prior to the due date for this brief because the Goldwater Institute did not decide to author this brief until seven days before its due date. Nevertheless, all parties were immediately notified by e-mail and USPS First Class mail of Goldwater's intent to file and the parties do not object to the filing of this brief. Consents are being filed concurrently with this brief.

single contributor may provide more than five percent of the Goldwater Institute's annual revenue on an ongoing basis.

This brief was primarily written by Matthew Ladner, Ph.D., Vice President of Research at the Goldwater Institute, with the assistance of counsel of record. The brief shares Dr. Ladner's knowledge and expertise in educational policy. Prior to joining the Goldwater Institute, Dr. Ladner was Director of State Projects at the Alliance for School Choice, where he provided support and resources for state-based school choice efforts. Dr. Ladner has written numerous studies on school choice, charter schools and special education reform. He is a graduate of the University of Texas at Austin and received both a Masters degree and a Ph.D. in Political Science from the University of Houston. Dr. Ladner previously served as director of the Center for Economic Prosperity at the Goldwater Institute and as Vice President of Policy and Communications at Children First America.

This case concerns *amicus* because the Goldwater Institute, through its Center for Educational Opportunity, works to advance innovative policy solutions to ensure that Arizona's students enjoy educational freedom and opportunity. This work includes hosting conferences, testifying at the State Capitol, and working with legislative and community leaders to promote a truly competitive, market-based, high quality educational system.

SUMMARY OF THE ARGUMENT

Much like the system of school choice upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Arizona provides genuine opportunities for school choice consistent with this Court's uninterrupted line of precedent. Arizona's private school parental tax credits are a small component of a larger framework of school choice that includes a number of schooling options such as inter-district choice between public schools, intra-district choice between public schools, one of the nation's most liberal public charter school laws, a growing number of magnet school programs, and state funding for online learning. Arizona's tax credit program provides scholarships for children to attend both secular *and* religious private schools.

There is no factual support for the Ninth Circuit's conclusion that Arizona pressures parents into choosing religious private schools over all other diverse and readily available options. When the system is considered as a whole, it becomes clear that Arizona not only provides numerous non-religious schooling options for parents, it also funds these options at a much higher level than the indirect assistance provided to parents through the tax credit program. Arizona law does not compel parents to choose religious private schools. If anything, Arizona's policies skew heavily in favor of secular options.

ARGUMENT

In the landmark case of *Zelman v. Simmons-Harris*, this Court held that the Cleveland Scholarship Program, a state funded voucher law, did not violate the First Amendment's Establishment Clause. In reaching this decision, the Court considered the full context of parental choice programs in Ohio. *Id.* at 653-60.

Likewise, when the full context of Arizona's parental choice programs is considered, it becomes clear that the tax credits at issue, A.R.S. § 43-1089, are merely a constitutional component of a larger system of "pure private choice." *See id.* at 650. The facts below reflect the reality that A.R.S. § 43-1089 in no way compels parents to send their children to religious private schools. Parents have many more secular options than sectarian options, and secular schools receive far more direct financial support from the State than sectarian private schools receive in aid from the tax credit program at issue.

A. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's K-12 Programs Give Parents Ample Choices Within and Between Public School Districts.

Arizona has a vibrant system of K-12 parental choice. State lawmakers adopted both inter- and intra- district choice programs for school districts in 1994. This law provides for state funds to follow

children to the public school of their choice, subject to the availability of space in each school. Although no systematic data exists compiling the number of students exercising inter- and intra-district choice, thousands of children utilize these programs.

The Gilbert Unified School District has over 3,000 out-of-district children attending, and the Mesa Unified School District has nearly 3,000 out-of-district children attending. Michelle Reese, *Education Choices Abound*, MESA TRIBUNE, March 10, 2010, *available at* http://dailyme.com/story/20100313000003053/education-choices-abound-arizona.html (last visited March 18, 2010). In addition, Arizona school districts created numerous magnet school programs, organized around a particular academic focus and without attendance boundaries. The State also funds online education courses, providing a new horizon of educational options for parents who wish to remain within the school district system. *See* Pat Kossan, *Arizona expands K-12 online learning*, ARIZ. REPUBLIC, September 24, 2009, *available at* http://www.azcentral.com/news/articles/2009/09/24/20090924onlineexpands0924.html (last visited March 18, 2010) (reporting that under a pilot program the state liberalized the provision of online courses for districts and charter schools statewide in 2009).

B. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's Public Charter Schools Provide Still More Options to Parents.

In addition to choices within and between school districts, Arizona has one of the nation's most liberal charter school laws. Charter schools are public schools that are governed by independent boards of directors and exempt from some aspects of state regulation. Funding for charter schools comes from the State on a per-child basis, and they have no geographically defined attendance boundaries. Arizona parents dissatisfied with their zoned district schools have numerous public charter school choices, including magnet schools, charter schools, cyber-charter schools and other district schools.

Almost a tenth of students attending public schools in Arizona now attend 566 charter schools, with new schools approved for operation every year. Charter school attendance has been strongly growing in Arizona, experiencing a 13% increase in aggregate enrollment during the 2008-2009 school year. Not only are charter school options ample, but parents take advantage of these options by sending their children to public charter schools despite the concurrent availability of private school tax credits. The facts do not support the conclusion that Arizona forcibly channels parents and children to private schools, much less sectarian private schools, through the challenged tax credit program.

C. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's Tax Credit Law Provides Substantially Less Aid to Parents Than Do Arizona's Public K-12 and Charter School Programs.

Arizona's tax credit law, A.R.S. § 43-1183, which aids children in attending both religious and secular private schools, provides a profoundly lower amount of aid per student when compared to the aid that follows students attending public schools. The Arizona Department of Revenue reports that the average scholarship was $1,909 per pupil in 2008. Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2008.pdf (last visited March 18, 2010). By comparison, the Joint Legislative Budget Committee of the Arizona legislature found that taxpayers granted a total estimated expenditure per pupil for public district school students of $9,698 per pupil in 2009. Joint Legislative Budget Comm., *K-12 Funding Since 2000 (All Funding)*, http://www.azleg.gov/jlbc/allfunding.pdf (last visited March 18, 2010). Unfortunately, the JLBC does not calculate an equivalent expenditure number for Arizona's 566 public charter schools, but we can calculate the total revenue per pupil number for Arizona public charter schools through information provided in the Arizona Superintendent of Public Instruction's Annual Financial Report. Specifically,

the 2009 Financial Report listed total revenue for all Arizona charter schools at $792,071,084. The same report lists the total Average Daily Membership (attendance) for Arizona charter schools as 99,018. Dividing total revenue by total enrollment results in a total revenue per pupil figure of $7,999 per pupil attending public charter schools.

In addition to the fact that aid to students attending public district and charter options is profoundly higher than the indirect subsidies provided by tax credits, the state provides aid to public schools on a guaranteed formulaic basis. As a thought experiment, imagine the situation reversed and public schools collected funds indirectly through a system of tax credits while private schools received direct per-capita subsidies from the state in much larger, guaranteed and predictable amounts. It would be a brazen religious school supporter indeed to stand up and cry foul by claiming that the state's system of tax credits for public schools *forced* children to attend public schools. Arizona's school funding system, in other words, profoundly favors attending district and charter schools. The notion that the tax credit system is forcing anyone to attend a private religious school is simply unsupportable, even laughable on its face.

D. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona Fiscal Policy Promotes Public School Attendance.

Finally, the totality of Arizona's fiscal policy strongly favors public district school attendance over public charter school attendance, and by an *even wider margin* provides much greater assistance for those attending public schools than private schools. Parents must pay public school taxes even if they do their fellow taxpayers the service of placing them in a private school at their own expense. If parents decide to seek an education they find more suitable for their children at a private school, they effectively pay twice – once when they pay taxes, another when they pay tuition and fees. Arizona's modest tax credit program only partially addresses this inequity. Consequently, there is no question that Arizona's fiscal policy disadvantages parents who choose to place their children in private schools rather than public schools – and, for this very reason, the challenged tax credit program certainly does not evince an intention by the State to force children into private sectarian schools.

CONCLUSION

Arizona does not force or coerce parents into using a tax credit scholarship, much less to send their children to sectarian schools. Therefore, the Ninth Circuit's decision needlessly threatens to impair parental choice as well as vital educational opportunities for Arizona's children. The data presented in this brief underscores that the Ninth Circuit's decision departs from vertical *stare decisis* by ignoring the "unbroken line of decisions" that culminated in *Zelman*'s holding. For these reasons, the Court should grant review.

Respectfully submitted,

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